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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 341.

SANFORD JACOBI, PLAINTIFF IN ERROR,

versus

THE STATE OF ALABAMA.

IN ERROR TO THE SUPREME COURT OF ALABAMA.

To their Honors, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Sanford Jacobi, plaintiff in error in the cause depending in this Court, entitled "Sanford Jacobi, Plaintiff in Error, vs. The State of Alabama," Term No. 341 on the docket of this Court, with respect represents:

That by the opinion and decree pronounced in the cause on November 17th, 1902, dismissing his writ of error because of alleged absence of jurisdiction in this Court to review the action of the Supreme Court of Alabama, there is error to his prejudice in the decree pronounced by this Court; that he is aggrieved thereby, and petitions your Honors for a reconsideration of the opinion and decree pronounced herein, and that, upon a rehearing accorded your petitioner, the jurisdiction of this Court be maintained.

It is respectfully submitted that this Court erred in the following particulars:

FIRST.

In holding that the power, authority and jurisdiction of the Supreme Court of Alabama, in reviewing criminal convictions, is limited and restricted to the points reserved in the trial court; whereas, under the statute law of Alabama, construed and interpreted by the uniform jurisprudence of its highest court, it is the mandatory duty of the reviewing tribunal, independent of points reserved in the trial court, to review the entire record in the case of a criminal prosecution and conviction, and to render such judgment on the record as the law demands.

SECOND.

That this Court erroneously held, that as the Supreme Court of Alabama was not invested with authority and jurisdiction to review points not reserved in the trial court, this Court was without power to review the action, or non-action, of the Supreme Court of Alabama.

THIRD.

That this Court erred in limiting the effect of petitioner's objection to the introduction of secondary proof, that he had the constitutional right to be confronted with the witnesses against him, and in holding, in the absence of reference to either the Federal or the State Constitution, that he must have meant the subordinate and not the higher instrument under which the claim of protection was asserted.

FOURTH.

That this Court erred in holding that, under the jurisprudence of Alabama, all objections to the admission of

illegal testimony, other than those reserved, were waived, and that the objection, to be available, must be specific; whereas, the unbroken current of authority in the State of Alabama in criminal cases is to the effect that specific objection to evidence illegal or irrelevant on its face, is not necessary, and that it is the duty of the reviewing court, independent of assignment of error, upon the face of the record for error apparent in the admission of illegal proof on a material matter, to reverse the judgment of conviction.

FIFTH.

That the assignments of error lodged in the Supreme Court of Alabama before argument and before decree, and in which petitioner asserted and claimed protection against the deprivation of his liberty, in consequence of the administration of glaringly illegal proof, without which he could not have been convicted, and which proof was administered in violation of his constitutional rights asserted under the Fourteenth Amendment—called the attention of the reviewing tribunal to the claim asserted; and the affirmance of the judgment of the trial court, without reference to the asserted claim under the Federal Constitution, was a denial of petitioner's right to the protection so claimed, and under the Constitution and the statutes in pursuance thereof, this Court was invested with jurisdiction to review the decree of the Supreme Court of Alabama.

SIXTH.

That the rule established by the Supreme Court of Alabama in Lowe vs. State, and upon which the decision of the Supreme Court was based, is repugnant to the Fourteenth Amendment, which guarantees the citizen against the deprivation of life, liberty or property without due process

of law, and under which constitutional grant is the right of the accused in criminal prosecutions to be confronted with the witnesses against him; and that the Supreme Court of Alabama, in applying the ruling in the case referred to, denied your petitioner the protection claimed by him under the Amendment aforesaid.

Wherefore, your petitioner respectfully prays that this petition, supported by his printed argument in this behalf, be considered; that this Court will review its opinion and decree in the cause, and, after consideration, will accord your petitioner the opportunity of having his claims to protection, under the Fourteenth Amendment, here asserted, heard by the Court; that the error which he claims may, in due course of procedure, be recognized and allowed, and for such other relief as the justice of the case demands.

And your petitioner will ever pray.

SANFORD JACOBI,
By HENRY L. LAZARUS,
His Attorney.

LIONEL ADAMS,
J. N. LUCE,
H. MICHEL,
Of Counsel.

Henry L. Lazarus, appearing herein as counsel for plaintiff in error, certifies, as an officer of this Court, that in his opinion the application for a reconsideration of the case upon the points decided and set forth in the foregoing petition, is well founded in law.

HENRY L. LAZARUS.

NEW ORLEANS, Dec. 15, 1902.

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versus

THE STATE OF ALABAMA.

IN ERROR TO THE SUPREME COURT OF ALABAMA.

APPLICATION FOR REHEARING AND ARGUMENT IN SUPPORT THEREOF.

HENRY L. LAZARUS,
Counsel for Plaintiff in Error.

LIONEL ADAMS,
J. N. LUCE,
H. MICHEL,
Of Counsel.

H. C. THOMASON, PRINT, 528 NATCHEZ STREET, N. O.

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And your petitioner will ever pray.

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By HENRY L. LAZARUS,
His Attorney.

LIONEL ADAMS,
J. N. LUCE,
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Of Counsel.

Henry L. Lazarus, appearing herein as counsel for plaintiff in error, certifies, as an officer of this Court, that in his opinion the application for a reconsideration of the case upon the points decided and set forth in the foregoing petition, is well founded in law.

HENRY L. LAZARUS.

NEW ORLEANS, Dec. 15, 1902.

ARGUMENT IN SUPPORT OF APPLICATION FOR A REHEARING.

The writ of error in this case was allowed by the Chief Justice of the Supreme Court of Alabama. There was no motion to dismiss for want of jurisdiction. On the argument of the merits, for the first time was the jurisdiction of this Court challenged. A careful review of the statute law and jurisprudence of the State of Alabama become indispensable in order to overcome the argument of the learned Attorney General resting upon the assumption, insisted upon both at the bar of this Court and in his brief, that "the rule stated as to the Supreme Court of Illinois is the law governing the Supreme Court of Alabama—its jurisdiction in such cases is appellate—*solely* to review errors in the ruling of the court below, and such questions *must be specially* reserved by proper exception in the trial court."

The present cause was argued on its merits on the 7th day of November, 1902. It was our purpose to submit a brief in reply to the contentions of the Attorney General, and in support of this Court's jurisdiction. The decision was handed down, unexpectedly, November 17th. In its opinion the views of the Attorney General as to the law controlling in Alabama in criminal trials and appeals were approved by this Court and made the basis of the judgment pronounced.

We respectfully but confidently submit that, tested by the statute law and settled jurisprudence of Alabama, the learned Attorney General *gravely erred* in his announcement of the controlling rule governing the Supreme Court of Alabama in the review of criminal cases, and that the opinion of this

Court is in conflict with the statutory law and the unbroken current of jurisprudence in the State of Alabama.

Whatever the rule may be, with reference to appeals in criminal trials which controls in Illinois, and upon the application of which this Court decided the Spiess case, the doctrine there announced is, unquestionably, under the statute law and jurisprudence of Alabama, without authority here. According to our appreciation of its effect, it was held in the reasons assigned to support the judgment rendered in the Spiess case that, where the point was not raised in the trial court, under the statute law of Illinois it was not reviewable in the appellate tribunal; and not being reviewable there, it could not be the subject of error in this Court.

The issue in the Spiess case, with reference to the seizure and production of the Herr Most letters, upon which error was assigned, was raised for the first time in this forum. There is nothing in the opinion of the Supreme Court of Illinois to indicate that the question had been presented by bill of exception properly reserved at the trial, or in other authentic form; and there is nothing to advise counsel, either in the opinion of the Supreme Court of Illinois or of this Court, whether assignments for error patent upon the record could be seasonably made in the appellate tribunal. Spiess vs. Illinois, 122 Ill. 232.

The controlling principle announced by this Court in the Spiess case, when placed in juxtaposition with the statute law of Alabama and the settled jurisprudence of that State, is without authority in the determination of the jurisdiction of this Court in the instant cause. If there be a State in this Union which affords to the accused every possible protection and safeguards his interests against the laches of

counsel and the errors of the trial Court, it is the State of Alabama. The power of the Supreme Court of Alabama as a reviewing tribunal in criminal cases *is not limited*, as has been erroneously assumed, "solely to review errors in the ruling of the court below, and such questions must be specially reserved by proper exception in the trial court." That court, by statute—and this, independent of any special reservation noted in the trial court—is directed to render judgment on the record as the law demands. Code of Alabama, 1876, par. 4990.

In that State the record in a criminal cause may be brought to the reviewing tribunal by appeal or by writ of error. On appeal, assignments of error disclosed by the record may be made, independent of the points reserved in the trial court. On writ of error, assignments of error patent on the face of the record may be pleaded and heard, independent of any proceeding had in the trial court; and this is the office of the writ of error.

But, beside the points reserved at the trial—independent of the writ of error in a criminal cause, and independent also of the assignments that may be made upon the record for errors apparent, or even for an enlargement of the errors stated or bill reserved—under the mandatory directions of the statute law, to see that justice has been done the accused, and that he has not suffered in consequence of an oversight of his counsel or of the errors of the trial Judge, the Supreme Court of the State will review the entire record which is brought up by the appeal.

In *Ex Parte* Knight, 61 Ala. 482, Chief Justice Brickell, in a well-considered opinion, construed the statutory law and jurisprudence of Alabama with reference to appeals

and writs of error in criminal cases, "with the hope of directing attention to their provisions that the practice may, in the future, be conformed to them." In the course of the opinion, this learned Judge said:

"When these statutes are read in the light of the common law, and of our former statutes, the legislative intent is manifest. The intent is to confer on defendants in criminal causes, a *plenary right* to a revision of the proceedings on a judgment of conviction.

* * * * * *

"But if a defendant has not reserved any question for the consideration of the court, the common law remedy of a writ of error remains to him, and the mode of obtaining it, and its operation is regulated by the statutes. * * * The statutes thus furnish a defendant in a criminal cause, two remedies for the revision of the judgment of conviction, each having a different field of operation. The first is when, in the court of original jurisdiction, he *reserves a question of law* for the consideration of this Court, the reservation appearing of record, calling into exercise the revisory jurisdiction of the Court—the second is, the writ of error lying when he has not reserved a question of law, but there is error of law apparent on the record. In either case, when the record reaches this Court, the statute imposes the duty on the Court of rendering 'such judgment on the record as the law demands.' *The Court is not confined to the questions reserved,* as under the former statutes when questions were referred, but the whole record is examinable, and if error has *intervened* to the prejudice of the defendant, the judgment must be reversed. Code of 1876, par. 4990."

In the case of Finley vs. State, 61 Ala. 201, the same eminent authority declared:

"The practice in criminal cases which has been observed in this State from an early day and sanctioned by repeated decisions of this Court is, that a defect in the indictment which would have been fatal on demurrer, *or error in the*

record of the proceedings, which would have been good ground in arrest of judgment, *if* that had been moved for in the primary court, will on appeal, or writ of error, compel a reversal of a judgment of conviction. The statute authorizes an amendment of an indictment, but only by consent of the defendant, entered of record. We have no statute applicable to criminal proceedings, which, after verdict and judgment, *cures errors not previously made the ground of objection*. On the contrary, the statute is imperative, that on an appeal, or writ of error, prosecuted from a judgment of conviction, 'no assignment of errors, nor joinder in error is necessary; but the Court must render such judgment on the record as the law demands.' Code of 1876, par. 4990.

"A motion in arrest of judgment is not confined to the indictment alone. That may be sufficient, averring with certainty the commission by the accused of the particular indictable offense imputed to him; and yet it may appear from other parts of the record, *that irregularity or illegality has intervened*, which vitiates the judgment."

In the course of his opinion, further on, the learned Judge holds:

"It would be ground of motion in arrest of judgment—and if no such motion is made *of assignment of error in an appellate tribunal, and if* NOT *assigned*, it is of that class of errors this Court must notice in obedience to the statute, and 'render such judgment on the record as the law demands.'"

In Frank vs. State, 40 Ala. page 11, Justice Byrd, announcing the views of the Court, said:

"The record purports to set out all the evidence introduced on the trial, and it shows that the prisoner offered none. Upon a demurrer to the evidence and a joinder therein, the Court should have given judgment for the prisoner, or if a charge had been asked that the prisoner could not be found guilty upon the evidence, the Court should have given it. In the first case, no exception was

necessary in order for this Court to revise the ruling of the Court, if the demurrer had been overruled; in the latter, it may have been necessary that an exception should have been taken, if the charge had been refused, in order for this Court to revise the refusal of the Court to give the charge.

"The prisoner, in his bill of exceptions, 'assigns as error' the refusal of the Court to give a charge asked, and also 'the conviction and sentence.' This must be taken as equivalent to an exception to the conviction and sentence. Sackett & Shelton vs. McCord, 23 Ala. R. 851. By Section 3663 of the Code it is provided that, *in criminal cases, this Court must render* such judgment as the law demands; and by this may be understood such judgment as the law demanded the court below to render. By Section 3650 it is provided that, 'if such question' (that is, a question of law) 'does not distinctly appear on the record, it must be reserved by an exception, taken and signed by the judge, as in civil cases;' which, impliedly at least, *gives the right* to the prisoner to have *any error which distinctly appears on the record revised by this Court.* The bill of exceptions is a part of the record; and, so much so, it has been held by this Court, that if it is inconsistent with the judgment-entry, it must control. 4 Ala. 516; 9 Ala. 430; The State vs. Jones, 5 Ala. 366; Vincent vs. Rogers, 30 Ala. 471."

The Supreme Court of Alabama in numerous cases has given effective application to the principle for which we contend, and, in the absence of *specific* objection taken in the trial court, and in the absence of assignments of error in the reviewing tribunal, has examined the record, and repeatedly held, that where evidence, manifestly incompetent, was administered, and was upon a material matter, under the mandate of the statute it was its duty to reverse.

In Robertson vs. State, 43 Ala. 325 (Ency. of Pleading and Practice, Vol. 2, p. 929 n.), the doctrine is thus stated:

"In criminal cases, the court *is not* confined to the errors assigned, nor is any assignment absolutely necessary; but in its absence the court will generally examine the record in the interests of justice."

The qualification to the general rule, that the objection to the admissibility of testimony should be specifically stated, is formulated upon the basis of the jurisprudence of Alabama, in the Encyclopedia of Pleading and Practice, vol. 8, pp. 228-9, subject, "Exceptions and Objections," in these words:

"The general rule that objections to evidence must be specific admits of this exception, that if they cannot in any manner be obviated, or if the evidence is clearly inadmissible for any purpose, a general objection will suffice. (Espalla vs. Richards, 94 Ala. 159). The reason for this is obvious. If the inadmissibility of the evidence be apparent on its face, no casting around by the court for a ground of exclusion is necessary. So it has been held that a general objection sustained by the trial court will be sufficient on appeal without the statement of the specific grounds of objection."

In the case of Davis vs. State, 17 Ala. 415, it was held, that where evidence is *prima facie* inadmissible, it is not necessary that the party objecting to it should *specify* the ground upon which his objection is founded, and that a *general* objection is sufficient.

In the case of Thompson vs. State (Supreme Court of Alabama), 17 Sou. Rep. 510, Mr. Justice Coleman said:

"The defendant was indicted and convicted of grand larceny. A great many exceptions were reserved to the ruling of the Court upon the admission and exclusion of evidence introduced or offered in the progress of the trial. In almost every instance the objection seems to have been of a *general* character, without *specifying any particular ground of objection.* A general objection *is sufficient* when the evidence offered is patently and palpably inadmissible for any purpose."

In the case of McClellan vs. The State, 117 Ala. 140, 141 (23 Sou. Rep. 655); the defendant was indicted for selling vinous, spirituous and malt liquors without a license.

In the statement of facts by the Reporter, there is contained the following summary:

"On the trial of the case, as shown by the bill of exceptions, the State introduced, as a witness, one Bray, who testified that in November, prior to the finding of the indictment, he was in the City of Alexandria, where the complainant kept a store, that he went to defendant's store and asked for whiskey, and defendant told him he did not have any; that thereupon he left the store and met one Henry Martin about 30 or 40 yards from defendant's store; that he, the witness, asked Martin if he knew where he could get some whiskey, and Martin said, 'I haven't got any whiskey, and I haven't got any money to pay for any whiskey with, but if you will furnish the money, I can get some whiskey;' the witness then said to Martin: 'Here is the money,' and gave him 20 cents, and then he and Martin went into a back room of the defendant's store."

The defendant objected to the conversation between Martin and witness, *but stated no grounds of objection*. He also moved to exclude the conversation with Martin, which witness detailed as above set out. The Court overruled the motion, and defendant duly excepted.

Brickell, C. J., said:

"A *specific* objection to evidence *illegal or irrelevant* on its face, has *never* been deemed necessary. 1 Brickell Dig. 887, Sec. 1189; Washington vs. State, 106 Ala. 58. Gunter vs. State, 111 Ala. 23. Within this category falls the conversation between the witness Bray and one Martin, before going to the defendant's house or place of business."

* * * * * *

In Gabriel vs. The State, 40 Ala. 357, the defendant was indicted for the larceny of a mule alleged to be the prop-

erty of S. J. Terrell. The Court admitted evidence of the confession of the prisoner that he had taken "Mass Lee's mule," without proof of identity of S. J. Terrell as "Mass Lee." There was a *general*, but no *specific* objection to the evidence.

In the opinion, after stating these facts, it is adjudged:

"All the evidence is set out in the record, and there is no evidence tending to show that 'Mass Lee' and S. J. Terrell are the same person. We cannot judicially know, nor could the jury legitimately presume from the evidence that they were the same person.

"The evidence objected to being illegal, should have been excluded by the Court. It is *evident* that the prisoner had in view the objection to its admissibility on the ground that the confession was *not voluntary*. But the objection is *general*, and we do not feel *authorized* to limit the extent of the same. *A general objection to the admission of evidence is sufficient, if the evidence is illegal upon its face*, when applied to the pleadings in the cause.

"Cunningham's Ex'r vs. Cochran & Estell, 18 Ala. 480.

"If the State had proposed to prove, or had proved, that 'Mass Lee' and S. J. Terrell were the same person, then the evidence would have been admissable. But, in the absence of such proof or proposal, the evidence was clearly inadmissible. We are satisfied that, upon the facts shown in the bill of exceptions, the declarations of the accused were voluntary, and on that ground should have been admitted, if there had been no valid objection, as above shown."

Where the bill of exceptions, as in Jacobi's case, purports to set out all of the evidence, it has been frequently held, in Alabama, that where this method was adopted, and it does not appear that proof of *venue* was made, the judgment will

be reversed, although *no objection* was urged in the lower court.

Saloman vs. State, 27 Ala. 27.

Brown vs. State, 27 Ala. 47.

Cawthorne vs. State, 63 Ala. 157.

Treating of the failure to make it appear that proof of venue was introduced, it is declared, in Childs vs. The State, 55 Ala. 31:

"The rules of the law are to be used so *as to effectuate justice, not to prevent it.* But it having several times been decided that a defendant may take advantage of the omission to introduce or set forth the evidence of such matter, under a general charge or exception, we do not feel at liberty to depart from the practice thus established, in a case like a capital felony, like the present. If the Court did err in certifying that the bill of exceptions in this cause contains all the evidence that was submitted to the jury, we must hold that it erred in not giving the charge in question. The evidence set forth did not entitle the State to a verdict of guilty against the defendants."

We deem these authorities eminently sufficient to make it manifest that, whatever the rule may be in other jurisdictions, in Alabama, at least, in matters of law the revisory tribunal is not restricted to a *specific* objection for a *specific* reason therein assigned in order to secure a reversal demanded by considerations of justice. And the confusion leading to the announcement by the learned Attorney General, results from his failure to bear in mind the distinction between an objection general in form and one resting upon specific reasons assigned. If the objection in general terms, timely taken, be good, although the reasons seeking to support it be unsound, the reviewing court must render judgment on the record, as the law demands, or, adopting

the language of the Supreme Court of Alabama, "such judgment as should have been rendered by the trial court."

But the assignment of one reason, or two, does not exclude in the revisory court the right to consider the assignment of other and additional reasons, wherever the objection to the admission of the evidence, though general in terms, is noted on the record. That is the office of the writ of error before the reviewing tribunal. It may be reviewed there upon an appeal or by writ, for error apparent upon the record. Encyclopedia of Pleading and Practice, Title, "Writ of Error," Vol. 7, p. 846; Wheeler vs. Winn, 53 Penn. 122; *ex parte* Knight, 61 Ala. 482; Tidd's Practice, 1134 *et seq.*

As was aptly said by this Court, speaking through Mr. Justice Harlan:

"The final judgment of a court of the United States in the case of the conviction of a capital or otherwise infamous crime is not reviewable here except upon writ of error. Our review of the judgment, when brought here in that form, is confined to questions of law properly presented by a bill of exceptions, or arising upon the record."

Bucklin vs. United States, 159 U. S. 681.

Cohens vs. Virginia, 6 Wheaton, 409.

The rule in civil actions which formerly prevailed in Alabama, and reference to which is made by the Court in its opinion in this case, and to which we shall in a moment advert, is controlled by statutory direction; and the reason for the distinction is noted by Chief Justice Brickell in *ex parte* Knight, 61 Ala. 486.

There are two cases cited in the opinion of this Court to support the doctrine, that "the Supreme Court will not

decide a question relating to the administration of evidence, not made and acted upon in the trial court: Freeman vs. Swan, 22 Ala. 106, and Robertson vs. Robinson, 65 Ala. 110." Both were civil cases.

In Freeman vs. Swan, theCourt said:

"We have not considered the question as to the admissibility of parol proof in this case which received the attention of the Chancellor, because we are not advised by the record that any objection was made to it by the defendants in the court below, and we will decide no question on error which was not there made by the parties and acted on by the court, and that action assigned and insisted upon in this Court as error, unless it be want of jurisdiction apparent upon the face of the proceedings in the court below."

If no objection was reserved, as is evident in the case cited, who could proclaim error as against the ruling? The proper foundation may have been laid for the admission of the proof, of which complaint was only made when the cause reached the reviewing tribunal.

The opinion in Robertson vs. Robinson was pronounced by Chief Justice Brickell, who was certainly familiar with the distinction between civil and criminal cases with reference to noting exceptions to the admissibility of evidence, since he himself had formally recognized it, and the observations that we have submitted to the Court, with reference to Freeman vs. Swan, find application here.

But even the restricted doctrine, which, according to the conclusions placed by your Honors upon the earlier adjudications, formerly obtained in Alabama, has been considerably modified in the more recent decisions.

In the late case of Espalla vs. Richards (Supreme Court of Alabama), 10 Sou. Rep., Mr. Justice Walker, speaking for the Court, of which the present Chief Justice of Ala-

bama was a member, in announcing the rule, even in *civil cases*, with reference to the admissibility of palpably incompetent evidence over a general objection, said:

"It is suggested for the appellees that there was a failure to specify any particular ground of objection to the admissibility of this evidence. *The illegality of the evidence was apparent upon its face*. To ascertain this it was not necessary for the Court to look to any fact that was not stated by the witness in detailing the conversation. No casting around to discover a ground of exclusion was required. It was obvious, without reference to any extrinsic fact, that Mr. Richard's statement to the salesman in his store was mere hearsay, so far as Mrs. Ryan was concerned. In such case the court should sustain the objection, without demanding a specification of what is already patent. The general rule requiring the ground of objection to be stated did not apply. Richards vs. Bestor, 90 Ala. 352; 8 South. Rep. 30; Pool vs. Devers, 30 Ala. 672; Cunningham vs. Cochran, 18 Ala. 479."

It appears, therefore, that notwithstanding the marked statutory distinction between exceptions in civil and criminal cases, the principle, expressly recognized in protecting the life and liberty ofthe citizen, has, in the interest of distributive justice, been extended to civil actions.

To the administration of the *hearsay* declarations of Micou and Bartlett, timely exception was interposed in the trial court, and before that forum, was asserted by the accused his objection to the admission of their testimony, because of his constitutional right to be confronted with the witnesses against him. Inferentially, the Court announces in its opinion that the objection in the trial court was limited in its effect to the Constitution of Alabama. If it be a constitutional right that was invaded, it is as legitimate an inference to

say that he referred to the higher Constitution, which guaranteed him against the deprivation of his liberty, without due process of law, under and within which is consecrated the fundamental and substantial right of confrontation. With this latter question we shall deal later.

Whatever the objection was in the trial court, whether specific or general, it was against the administration of the proof tendered, and when admitted, timely exceptions were reserved and sealed by the trial Judge. The evidence administered under the Court's ruling, clearly and unmistakably falls under the ban of the inflexible rule announced by Chief Justice Brickell, in McClelland vs. State, *supra*, being deemed illegal and invalid although no specific objection was made.

When the record was brought, under statutory direction, to the Supreme Court for review, it became its solemn duty, under the bill reserved, to reverse the verdict and judgment entered of record, unless the doctrine laid down in Lowe vs. State, and the rule announced in that and succeeding cases be adjudged as perfectly consistent with the prohibitory declarations of the Fourteenth Amendment of the Constitution of the United States. And it is no answer to our contention to suggest that, under the doctrine of Lowe vs. State, the rule is well settled in Alabama which authorizes the admission of that character of proof. Such a reply assumes as virtually undisputed the very question which is here in error for review, and which is honestly and earnestly pressed upon this Court's consideration.

It is a *petitio principii*, to say that the rule in Lowe vs. State, if sound, is controlling. We are prepared to recognize the principle that if Lowe vs. State is not amenable

to the charge preferred, then there is not a Federal question on the record, and the writ of error was properly dismissed. But before the Court reaches such a conclusion, it must announce the rule there propounded to be free from the objection urged. Assuredly, it cannot be said, under the statutory law and jurisprudence of Alabama with reference to appeals in criminal cases, that because the exception to the admissibility of manifestly illegal evidence was not specific, therefore the constitutional right of the accused to protection under the Fourteenth Amendment, upon which he relies, was abandoned and waived, since the revisory tribunal is expressly required to render judgment on record as the law demands.

We have argued to no purpose, and the authorities cited are without the slightest effect, if this Court should continue to adhere to the opinion already expressed that while there are objections which, if timely taken and preserved in the record, may be ground for reversal, yet when these are not specifically insisted upon and reserved, they will be considered as waved.

When the record of this case was lodged in the Supreme Court of Alabama under its settled practice (Rules of Practice, Code of 1886, par. 1, page 155, Section 4990, *ib.*), plaintiff in error, taking advantage of the objection interposed in the trial court, to the admission of the testimony of Micou and Bartlett, *before* the hearing of the cause and *before* judgment, filed his assignments of error patent on the face of the record, and claimed and urged the protection of the Fourteenth Amendment to the Constitution of the United States.

Under the settled jurisprudence of this Court, where the

reviewing power extends to all matters of error patent upon the face of the record, should the protection of the Constitution, laws or treaties of the United States be asserted before final judgment, and the disposition of the Federal question becomes necessary in the decision of the cause, this Court is, by the Constitution of the United States and the laws in pursuance thereof, charged with jurisdiction upon error.

Let us go to the record. Upon the tender of Micou, as a witness, counsel for defendant objected, first, that the defendant, Jacobi, had the constitutional right to be confronted by the witnesses against him; * * * fifth, that the proposed testimony of the witness, Micou, was purely hearsay. The Court overruled defendant's objections, and "each ground thereof," and permitted Micou to testify as to what had been the evidence of Lizzie Parker on the former trial. To the Court's action and ruling defendant, in proper form, and in due time, excepted. R. 11.

In the Supreme Court of Alabama, the following assignments of error were lodged before argument. We shall only quote so much of the assignments of error as are pertinent to the question under immediate discussion.

IN THE SUPREME COURT OF THE STATE OF ALABAMA.

STATE OF ALABAMA VS. SANFORD JACOBI.

ASSIGNMENTS OF ERROR.

Now here comes, in his own proper person, Sanford Jacobi, plaintiff in error in the above-mentioned and entitled cause, and which error complained of is now before this Honorable Court for review, consideration, and decision, said error having been properly sealed by the trial judge, who certifies it to this Honorable Court for its review and decision.

And here giving presently the Court to understand and be informed that in addition to the error embodied in the bill sealed as aforesaid, there is other error apparent upon the record and of which this appearer complains, the same having operated to his manifest injury and prejudice, inasmuch as it appears by said record that this appearer is a citizen of the United States, having been born therein, and is a citizen of the State of Alabama, within which State he resides, and was a citizen of the United States and of the State of Alabama at the time of and since the acts complained of, and which are charged against your appearer as being violative of the laws of said State; that, as is patent upon said record, your appearer, during the progress of the trial before the City Court of Montgomery, County of Montgomery, State of Alabama, and at all times since said trial, and now and presently here, has been and is denied the benefits, advantages and protection accorded him by Article I, §7, of the Constitution of the State of Alabama; and was, during the progress of said trial, at all times, and is now, by the action of the State of Alabama and its prosecuting officers in its behalf, denied the privileges and immunities accorded him by the Fourteenth Amendment to the Constitution of the United States, and which privileges and immunities, as a citizen of the State of Alabama and of the United States, he pleads as cause of error patent upon the record, demanding, in accordance with law, its maintenance by this court, and the reversal of the verdict and the judgment pronounced thereon against this appearer.

And for further and additional error patent upon the record, this appearer says that he was, during the progress of the trial now before this court for review, throughout said trial, after verdict and judgment pronounced upon verdict, at all times since and is now, by the State of Alabama and its prosecuting officer, been refused and denied the benefit and protection accorded him, as a citizen of the United States and of the State of Alabama, by the Fourteenth Amendment to the Constitution of the United States, inasmuch as this appearer was denied

and refused the protection of said article of the Constitution, and was tried and convicted without the benefits, advantages and protection guaranteed to him by the Fourteenth Amendment to the Constitution of the United States, that he should have at all stages, during the trial and in all proceedings subsequent to the trial, the benefit and protection of said article, and particularly so much thereof as guarantees to him due process of law, and that this refusal and denial to accord him, in the progress of the trial and at all times since, due process of law, is error patent upon the face of the record, which demands the reversal of the judgment pronounced upon the verdict herein complained of.

Appearer further assigns as error patent upon the face of the record, that during the progress of the trial hearsay evidence was admitted and allowed by the ruling of the Court, after timely objection, to go to the jury for their consideration, which evidence so administered was material in the cause, and without which testimony, as appears by the record, and particularly the testimony of W. H. Micou and Henry Bartlett, no conviction could have been secured; and the administration of said evidence was in violation of the Common Law, in violation of the rights of this appearer, in violation of the Constitution of Alabama and the Fourteenth Amendment to the Constitution of the United States, and is reversible error.

And this appearer, for further error patent on the face of the record, assigns as cause the withdrawal of the issues of fact from the jury as to whether the proper predicate had been established by the evidence administered, to admit of second-hand or substituted proof on a fact material to the State's cause; that under the Common Law, as administered, and under the protection accorded him of due process of law, by the Fourteenth Amendment to the Constitution of the United States, the withdrawal of the question of fact as to whether a proper predicate had been laid for the administration of subordinate and secondary proof, was a question determinable not by the Court, but by the jury, and before the administration of secondary proof, and

particularly the testimony of W. H. Micou and Henry Bartlett, and the action of the Court, as appears by the record, in determining a question of fact, which should have been, under the law and the Constitution of the United States, submitted to the jury, violates appearer's rights under the Constitution of the State of Alabama, the laws prevailing in said State, and the Fourteenth Amendment to the Constitution of the United States, it operating a denial of the benefits and protection accorded this appearer by said Fourteenth Amendment to the Constitution of the United States.

And for further assignment of error patent upon the face of the record, this appearer says that there was not sufficient predicate laid for the administration of any proof as to what any absent witness had said previously or upon any prior trial; and that your appearer was denied the benefits, advantages and protection guaranteed to him by the said Fourteenth Amendment, inasmuch as he had not the opportunity of confrontation with the witnesses against him, and the statements made by them were not admissible as evidence against this appearer, and should not have been submitted to the trial jury in the absence of a predicate fully established, and which would admit the administration of that character of proof; and that, in consequence of the action of the Court, during the trial, upon judgment, and at all times since, the State of Alabama, through the officers prosecuting in its behalf, has denied to this appearer the benefits, advantages, and protection accorded him by the Common Law, the Constitution of the State of Alabama, and the Fourteenth Amendment to the Constitution of the United States.

Wherefore, for these and divers other good and sufficient reasons appearing on the face of the record, this appearer asks that the errors herein complained of may be considered, and after consideration thereof, the said errors be recognized by this honorable court as cause good and sufficient justifying by the court's decree a reversal of the judgment pronounced in the cause and the verdict upon which said judg-

ment and sentence were entered; and that such further orders be made and entered as are necessary in the premises to accord to this appearer that measure of protection to which he is entitled under the Constitution of the State of Alabama, and the Fourteenth Amendment to the Constitution of the United States, in such cases made and provided.

HENRY L. LAZARUS,
JNO. M. CHILTON,
A. A. WYLY,
Of Counsel for Sanford Jacobi.

State of Alabama,
County of Montgomery.

Sanford Jacobi, duly sworn, deposes and says: That he has read the foregoing assignments of error in his behalf; that he is advised that same are sound in law; that he invokes the protection accorded him as a citizen of the United States and of the State of Alabama, by the Fourteenth Amendment to the Constitution of the United States and that said assignments are, upon the advice of counsel, interposed in good faith, and in the honest belief that the errors assigned demand the reversal of the judgment and the verdict in said cause.

SANFORD JACOBI.

Sworn to and subscribed before me, this 18th day of December 1901.

J. W. TERRY,
Notary Public.

[Notarial Seal]

Rec. p. 25.

Independent of the general objection, based upon the constitutional right of the accused, the attention of the Supreme Court of Alabama was pointedly directed, by the assignments of error, to the asserted rights of the accused under the Fourteenth Amendment of the Constitution, which he claimed was infracted by a denial of the right of confrontation. It is true, there was no direct attempt upon the part of the reviewing tribunal to meet the issue so distinctly presented. The Court was content to rest its decision upon its opinion in Lowe vs. State. The attack was

upon the rule announced in that case as being violative of the substantial and fundamental right of the citizen to confrontation, protected by the Fourteenth Amendment of the Constitution of the United States. The issue presented we deduce from the course pursued, could not be met and was therefore evaded. There was, apparently, no answer that even so learned a Judge as he who pronounced the opinion in the case could formulate that would have supported the doctrine in the case relied upon for the affirmance of the judgment complained of. As was appositely said by Chief Justice Woodward (53rd Pennsylvania State, 132, Wheeler vs. Winn): "But some Judges were found who would *dodge* the proposition of law, commonly called points, which counsel submitted."

It is observed regretfully that the desire is entirely too prevalent with Courts to evade the decision of issues specifically raised and which in their application are controlling and determinative of the case they have for adjudication. There could have been no disposition of the matters in dispute without a determination of the constitutional right claimed by the accused, save by evading or, in the language of Mr. Chief Justice Woodward,—"dodging the issue."

This Court, in the opinion pronounced herein said, in respect of the proceedings before the Court of last resort in Alabama: "If the court had passed upon the question, our jurisdiction might have been maintained." This statement we suggest, with submission, is entirely too broad and not warranted by its own settled jurisprudence. If such were the law, an evasion by the State Court of a Federal question would defeat every right of review in this Court. As we expect to establish, the controlling issue, and the one

determinative of jurisdiction here, is whether the Federal question was duly presented, and whether its decision was necessary to the judgment or decree in the case.

The limitation placed, in the opinion of this Court, upon the objection of the accused to the introduction of the hearsay statements of Micou and Bartlett, is, we respectfully submit, entirely too narrow when it is considered that he was asserting, in the protection of his liberty, a constitutional right.

His Honor, the Chief Justice, because of an absence, in his objection, of reference by the accused, to the Constitution of the United States, concludes: "It is plain that the constitutional right asserted was under the State Constitution." It is true that, in stating the objection, there was an absence of allusion, in terms, to the Federal Constitution; but it is equally true that there was no reference to the Constitution of the State of Alabama; the silence observed in respect of both instruments leaves the objection, ae was obviously the design, one general in scope, and, if presumptions are to be indulged in, or deductions drawn, from the want of specific averment, the presumption should be that the assertion of the right and the claim of protection is under the higher and not the subordinate guarantee. While the rule is generally recognized that when a claim is justified under the Constitution, laws or treaties of the United States, specific reference must be made thereto, we hold to the view that the limitation is to the general laws and the treaties of the United States and is not to be extended to the fundamental law itself where the party claims protection under its aegis. We do not understand that in setting up a right under the Constitution of the

United States, and claiming the protection which follows, there is imposed the obligation of indicating the number of the Article and the particular Section under which the right asserted is protected. See Oakey Co. vs. Butler County, 166 U. S. 651. The reason of the rule with reference to statutes and treaties is so apparent as to require neither comment nor elucidation. But it can have no application to the organic law of the Nation. For instance, in pleading the protection, should an objection be put of record that the State statute relied upon "impaired the obligations of a contract" protected by the "Constitution," would anyone undertake to say, in passing upon an adverse decision, that a Federal question was not raised, so as to invite review in this Court?

In Waterpower vs. The Street Railway Company, Mr. Justice Brown, speaking for the Court, said:

"This Court has repeatedly held that, if the Federal question *appears* in the record and was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specifically set up and claimed is not conclusive against a review of such question here. (Authorities.)" 172 U. S. p. 489.

If there be any force in the contentions of the plaintiff in error, submitted in the printed argument, then the right of the accused to confrontation in criminal prosecutions is protected by the Fourteenth Amendment, which prohibits the State or any of its agencies from depriving the citizen of his life, liberty or property, without due process of law.

At this stage of the discussion, we submit that we have established under the statute law and jurisprudence of

Alabama, and upon principle, the following propositions, viz:

First. That the Supreme Court of Alabama, sitting in review of convictions in criminal cases, is not limited and restricted to objections reserved in the trial court, but is directed by mandatory statutes to examine the entire record and to decide the case according to law.

Second. That a review of convictions in criminal cases may be had by "statutory appeal" or by "writ of error," and that a reversal is to be decreed "where there is error apparent on the face of the record."

Third. That, independent of objections noted in the trial court and reserved, under the practice of the Supreme Court of Alabama, assignments of error are permissible, although not necessary, in order to correct "error apparent on the face of the record."

Fourth. Where objection is reserved, but is so general in form as not to disclose or indicate the basis or ground of objection, and evidence "illegal or irrelevant" is administered upon a material matter, the reviewing court will direct a reversal.

Fifth. That where a constitutional right is asserted and protection claimed under it, without indicating under which instrument the right is claimed, and both instruments contain substantially the same provisions, it is a legitimate inference that the claim was asserted under the *superior* grant and not under the *inferior* one, and the recognition of this right should always be accorded to the claimant where life or liberty is involved.

Sixth. A series of rulings violative of the supreme law of the land, and in disregard of the fundamental and sub-

stantial right of the citizen, cannot be the basis for the support of judicial action, when attacked, because of its repugnancy to the Constitution; and the evasion of the question by the State tribunal cannot deprive this court from revising its decision.

If any one of the foregoing deductions is supported by authority and is sound in principle, it must be evident that this Court, in dealing with extent of the revisory power vested in the Supreme Court of Alabama, has been led into error; and we feel assured that once the error has been indicated, it will be prompt to recognize it and to conform its own views to the statute law and jurisprudence of the State from which the "Writ of Error" in this case is prosecuted.

Our contention is that, independent of "a specific reservation," in the trial court, of the right claimed and the protection afforded by the Fourteenth Amendment, the assignment of errors in the Supreme Court of the State, before judgment directing its attention to the claim there asserted under the provisions of the Fourteenth Amendment, was sufficient. And *this* Court, upon the allowance of the writ of error, independent of the reviewing Court, was seized of jurisdiction if the disposition of the Federal question was necessary to a decree in the cause.

As we understand the jurisprudence as settled by this Court.

(*a*) Error may be prosecuted from the highest Court of the State in which the question could be determined first whenever a right was asserted and claimed under the Constitution, laws or treaties of the United States in the

trial court, and was passed upon adversely in that Court and subject to review in the appellate tribunal.

(*b*) Whenever the reviewing Court of the State was invested with the right, power and authority to act upon assignments of error patent upon the record, and where the record justified the claim of a Federal question, the decision of which was necessary to the determination of the case, and the claim asserted was denied.

(*c*) Where the record itself, independent of a Federal claim asserted in the trial court or assigned in the reviewing court, presented a Federal question determinative of the controversy, whether that claim of Federal protection was passed upon or ignored by the reviewing tribunal.

(*d*) Where, after decision in the reviewing Court, an application for rehearing was presented, and for the first time a Federal question was raised, the disposition of which was necessary to the determination of the cause, and the reviewing Court passed upon the rehearing and in consequence reviewed the question and denied the rehearing; error will lie to review its decision.

We recognize that if the claim to Federal protection is not raised before *final* judgment in the reviewing tribunal, it cannot be raised on application for rehearing except as already indicated, nor can it be raised upon removal of the record by "Writ of Error" to this Court, accompanied by assignments of error under its rules. In other words, and briefly stated, the claim to Federal protection must be raised before final judgment, either in the trial Court or in the appellate tribunal. In the instant case, under the statute law of Alabama and its jurisprudence, it was timely raised, and it was fully argued. We have already observed

that nothing in the opinion of the learned Chief Justice of the Supreme Court of Alabama indicates that a Federal question dominant and controlling in the disposition of the case, was either suggested or argued before that august tribunal, and yet that learned Justice who himself pronounced the opinion in the State tribunal upon presentation of plaintiff's application for removal of the case upon error, allowed the writ.

We have abundant authority in the numerous decisions of this Court to support the propositions which we have announced, and which are determinative of the jurisdictional right of this Court over the issues raised and submitted on behalf of plaintiff in error.

In Zimmerman vs. Nebraska, 116 U. S. 54, the rule is formulated that this Court is without jurisdiction over a case brought here on error from the Supreme Court of the State *unless* it appears from the record that a Federal question was raised in that Court by assignment of error *before the final judgment* from which the "Writ of Error" has been taken.

In Arrowsmith vs. Harmoning, 118 U. S. 194, there was no suggestion of a Federal question in the trial Court or in the District Court, where the case was carried and affirmed on petition in error. The case was then taken on another petition in error to the Supreme Court, where, for the first time, *there was suggested by assignment the Federal question*, and dealing with it, this Court, through Mr. Chief Justice Waite, said:

"This is the first time, so far as the record discloses, that even the *semblance* of a Federal right was set up in the case, and even here it is not easy to see on what ground it

could be claimed that Arrowsmith had been deprived of his property in violation of the Constitution of the United States. It was for this reason, perhaps, that the Supreme Court, while affirming the judgment of the District Court, *took no notice* of the assignment of error in its opinion. The decision, however, *necessarily involved* a denial of the right which was claimed in this way, and thus we probably have technical jurisdiction. For this reason the motion to dismiss must be denied."

In the case of Fowler vs. Lampson, 164 U. S. 255, this Court, speaking through Mr. Justice Peckham, said:

"Where a case is brought to this Court on error or appeal from a judgment of a State court, unless it appear in the record that a Federal question was raised in the State court *before the entry of final judgment in the case*, this Court is without jurisdiction. Zimmerman vs. Nebraska, 116 U. S. p. 54. It has also been frequently decided that, to give this Court jurisdiction on 'Writ of Error' to a State Court, it must appear affirmatively, not only that a Federal question was presented for decision by the State Court, but that its decision was *necessary to the determination of the cause*, and that it was decided adversely to the party claiming a right under the Federal laws or Constitution, or *that the judgment rendered could not have been given without deciding it*. (Authorities)."

In Rothschild vs. Knight, 184 U. S. 337, the Federal question was raised for the *first time* in the Supreme Court of Massachusetts upon an assignment of errors. Mr. Justice McKenna, speaking for this Court, said:

"A motion is made to dismiss the 'Writ of Error' upon the ground that no Federal questions were raised in the Superior Court. Federal questions were raised, however, on 'Writ of Error' to the Supreme Court, and that, we think, was a sufficient claim. (Authorities)."

See Susquehanna Broom Co. vs. West Branch Broom Co., 110 U. S. See also Morrison vs. Watson, 154 U. S. 115.

Although the "Writ of Error" prosecuted from the Supreme Court of the State of Missouri was dismissed in the case of the Oakley Stave Co. vs. Butler County, the reasoning of Mr. Justice Harlan in that case, and the authorities cited to support the conclusions announced, apply with striking force to the maintenance of the jurisdiction of the Court in this case. After reviewing the earlier decisions of this Court where the right was recognized on the part of the plaintiff in error to raise in the Supreme Court of the State the Federal question, if it was involved in the case as presented to that Court, that learned Justice said:

"If there has been any modification of the views expressed in the two cases just cited, it has been only in the particular that it is not always necessary to refer to the precise words or to the *particular section* of the Constitution under which some right, title, privilege or immunity is claimed, and that it is sufficient if it appears affirmatively from the record that a right, title, privilege or immunity is specially set up or claimed under that instrument or under the authority of the United States." 166 U. S. 657.

That the record in this case presented to the Supreme Court of the State of Alabama the Federal question, must be conceded. That it had the right, and it was its duty, under the statutory mandate, to review the record, cannot be questioned. That the State Court's evasion of its plain duty cannot deprive this tribunal of its jurisdiction and power to review its action, we apprehend, will not be denied. This Court, in the opinion rendered herein, said: "If the Court, however, had passed upon the question, our jurisdiction might have been maintained," and to support the announcement of that proposition, quoted Mallett vs. North Carolina, 181 U. S. 589. In Mallett vs. North Carolina, the Federal

question, upon which the Court's jurisdiction was maintained, was not raised until the judgment of the Supreme Court had been rendered, and before it was certified down to the trial court. Defendants filed a petition for re-argument, and therein presented, for the first time, the Federal question upon which they relied. The Court entertained the petition, and proceeded to discuss and decide the question raised. The contention before this Court was, that the Federal question had been raised *after the decree*. Mr. Justice Shiras said:

"In support of the motion to dismiss, numerous decisions of this Court are cited to the effect that it is too late to raise a Federal question by petition for a rehearing in the Supreme Court of a State after that Court has pronounced its final decision. (Authorities). But those were cases in which the Supreme Court of the State *refused* the petition for a rehearing, and dismissed the petition *without passing upon the Federal questions*. In the present case, as already stated, the Supreme Court of North Carolina did not refuse to consider the Federal questions raised in the petition, but disposed of them in an opinion found in this record. State vs. Mallard, 125 N. C. 718.

"Had that Court declined to pass upon the Federal questions, and dismissed the *petition* without considering them, we certainly would not undertake to revise their action." See Turner vs. Richardson, 180 U. S. 87.

Your Honors have for consideration in this case one of the most important questions ever submitted to this Court for decision. It affects in its scope the lives and liberty of every American citizen, and the only protection that the citizen has against the arbitrary acts of his State, and at times of its agencies, is that accorded him by the Fourteenth Amendment to the Constitution. The right of confrontation in a criminal prosecution, in the absence of constitutional direc-

tion permitting the introduction of secondary proof, is all that is now left of the Fourteenth Amendment, so far as it relates to the lives and liberties of the citizen. The right, by constitutional direction, to dispense with an indictment for a capital offense is confided to the States under the doctrine of Hurtado vs. California. The right of trial by jury is a matter under the control of the States under the announcement of this Court in Maxwell vs. Dow. In the State of Alabama, there is neither constitutional provision nor statutory direction which qualifies the substantial and fundamental right of confrontation. At all events, until some action is taken by the State, in derogation of the common law the principles of the magna charta as preserved in the Constitution of Alabama and of the United States must continue to control and repress any attempt to deny the right of confrontation as opposed to the spirit of our institutions and violative of the Fourteenth Amendment of the Constitution of the United States, which, in its prohibitive terms, operates upon the State and all of its agencies.

Turning to the recent decisions of this Court, no stronger case could be suggested, and certainly none found in the reported decisions for the maintenance of the Court's jurisdiction in this case upon principle, than that of Chicago, Burlington & Quincy R. R. vs. Chicago, 166 U. S. 231, which was a proceeding for the condemnation of land under the Eminent Domain Act of the State of Illinois, a proceeding purely statutory, minute in all its details, specifically setting forth every step to be taken in the progress of the case, from its inception to its final determination, but not containing an allusion to the answer by the

defendants. This Court, speaking through Mr. Justice Harlan, said:

"It is not, therefore, important that the defendant neither filed, nor offered to file, an answer specially setting up or claiming a right under the Constitution of the United States. It is sufficient if it appears from the record that such right was specially set up or claimed in the State Court in such manner as to bring it to the attention of that Court."

"Now the right in question was distinctly asserted by the defendant in its written motion to set aside the verdict and grant a new trial. Among the grounds for a new trial were the following: That the several rulings of the Court in excluding proper evidence for the defendant, the statute under which the proceedings for condemnation were instituted, and the verdict of the jury and the judgment based upon it, were all contrary to the Fourteenth Amendment, declaring that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its limits the equal protection of the laws.

"When the trial Court overruled the motion for a new trial and entered judgment, it necessarily held adversely to these claims of Federal right.

"But this is not all. In the *assignment of errors* filed by the defendant in the Supreme Court of Illinois, these claims of rights under the Constitution of the United States were distinctly reasserted.

"*It is true that the Supreme Court of Illinois did not in its opinion expressly refer to the Constitution of the United States.* But that circumstance is not conclusive against the jurisdiction of this Court to re-examine the final judgment of the State Court. The judgment of affirmance *necessarily* denied the Federal rights thus specially set up by the defendant; for that judgment could not have been rendered without deciding adversely to such claims of right. Those claims went to the very foundation of the whole proceeding so far as it related to the railroad company, and the legal

effect of the judgment of the Supreme Court of the State was to deny them. 'The true and rational rule,' this Court said in Bridge Proprietors vs. Hoboken Co., 1 Wall. 116-143, 'is that the Court must be able to see clearly, from the whole record, that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied.' In Roby vs. Colehour, 146 U. S. 123-159, it was said, that 'our jurisdiction being invoked upon the ground that a right or immunity, specially set up and claimed under the Constitution or authority of the United States, has been denied by the judgment sought to be reviewed, it must appear from the record of the case, either that the right, so set up and claimed, was expressly denied, or that such was the necessary effect in law of the judgment.' (Authorities). There is, we conceive, no room to doubt that the *legal effect* of the judgment below was to declare that the rights asserted by the defendant under the national Constitution were not infringed by the proceedings in this case. Consequently, the motion to dismiss for want of jurisdiction must be overruled, and we proceed to examine the case upon its merits."

The controlling principle announced by this Court in the Burlington case, applies with particular cogency here, and supports the jurisdiction of this Court in the instant case. The decision maintaining this Court's jurisdiction did not rest upon the fact that the Federal question had been specifically urged in a motion for a new trial, but because it was formally presented in the assignment of errors filed in the Supreme Court of Illinois, wherein the rights of plaintiff in error were distinctly asserted under the Constitution of the United States.

That this plaintiff claimed the protection of the Four-

teenth Amendment; that he did it "at the proper time and in the proper way;" and that the decision of the Supreme Court of Alabama was adverse to the claim asserted, is manifest upon the review of the record and the decision in the cause, and without holding adversely to his asserted right the judgment of the trial court would necessarily have been reversed.

See Murray vs. Louisiana, 163 U. S. 101.

Respectfully submitted,

HENRY L. LAZARUS,

Counsel for Plaintiff in Error.

LIONEL ADAMS,
J. N. LUCE,
H. MICHEL,

Of Counsel.

NEW ORLEANS, Dec. 15, 1902.

APPENDIX.

SUPREME COURT OF THE UNITED STATES.

No. 341.—October Term, 1902.

Sanford Jacobi, Plaintiff in Error,
vs.
The State of Alabama.

In error to the Supreme Court of the State of Alabama.

[November 17, 1902.]

Mr. Chief Justice FULLER delivered the opinion of the Court:

Jacobi was convicted in the City Court of Montgomery, Montgomery County, Alabama, on an indictment for criminal assault, and the judgment against him was affirmed by the Supreme Court of that State. 32 So. Rep. 838. To revise that judgment this writ of error was brought.

The conviction was the result of a second trial of the case, and the alleged victim of the assault, who had testified at the first trial, was not present at the second. But evidence of her previous testimony was admitted against defendant's objection, and it is contended that thereby defendant was deprived of rights secured by the Federal Constitution, and denied due process of law. The question for us to decide at the outset is whether such a claim was specially set up at the proper time and in the proper way.

The rule is firmly established by the decisions of the highest Court of Alabama, that when a witness is beyond the jurisdiction of the court, whether he has removed from the State permanently, or for an indefinite time, his testimony on a former trial for the same offense may be given in evidence against defendant on a subsequent trial. *Lowe* v. *State*, 86 Ala. 47; *Perry* v. *State*, 87 Ala. 30; *Pruitt* v. *State*, 92 Ala. 41; *Matthews* v. *State*, 96 Ala. 62; *Burton* v. *State*, 115 Ala. 1.

In this case evidence was introduced before the trial judge that the witness was not in the State at the time of the trial, and that her absence was of a permanent or in-

definite nature. There was no pretense of absence by procurement and there was evidence of diligence in attempting to serve process upon her. It was held that sufficient foundation for the admission of evidence of her former testimony had been laid and the Supreme Court concurred in that conclusion. Defendant objected to this preliminary proof and moved to exclude it on several grounds, one of which was "that the defendant has the constitutional right to be confronted by" the witness. These objections having been overruled, evidence was introduced of the testimony given by the absent witness on direct and cross-examination on the former trial, to which defendant objected on the ground, among others, "that the defendant, Jacobi, has the constitutional right to be confronted by the witnesses against him." The trial judge overruled defendant's objections, and each ground thereof, and admitted the evidence, and defendant duly excepted. No reference to the Constitution of the United States was made in the objections. The constitution of Alabama provided that: "In all criminal prosecutions the accused has a right . . . to be confronted by witnesses against him;" and it is plain that the constitutional right asserted was under the State constitution. *Miller* v. *Cornwall Railroad Company*, 168 U. S. 131; *Kansas Endowment Association* v. *Kansas*, 120 U. S. 103.

After the case reached the State Supreme Court, error was assigned to the admission of the evidence as being in violation of the Fourteenth Amendment. The Supreme Court did not refer to that contention, presumably because of the settled rule in Alabama in criminal cases, that when specific grounds of objection to the admission of evidence are assigned, all others are waived; *McDaniel* v. *The State*, 97 Ala. 14; and that the Supreme Court will not decide a question relating to the admission of evidence not made and acted on in the trial court. *Freeman* v. *Swan*, 22 Ala. 106; *Robertson* v. *Robinson*, 65 Ala. 610. The Supreme Court was therefore not called upon to revise the judgment of the City Court for error not committed, and we cannot interfere with its action in adhering to the usual course of its

judgments. If the court, however, had passed upon the question our jurisdiction might have been maintained. *Mallett* v. *North Carolina*, 181 U. S. 589; *Dreyer* v. *People*, *ante*, *p.* ——

In *Spies* v. *Illinois*, 123 U. S. 131, where objection to the admission of a certain letter, because obtained in violation of the Constitution of the United States, was made in the Supreme Court of the State for the first time, and that court declined to consider the constitutional question supposed to be involved on the ground that it was not raised in the trial court, Mr. Chief Justice Waite said: "To give us jurisdiction under section 709 of the Revised Statutes, because of the denial by a State Court of any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity, was 'specially set up or claimed' at the proper time, in the proper way. To be reviewable here the decision must be against the right so *set up or claimed*. As the Supreme Court of the State was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the Supreme Court was only authorized to review the judgment for errors committed there, and we can do no more. This is not, as seems to be supposed by one of the counsel for petitioners, the question of a waiver of a right under the Constitution, laws or treaties of the United States, but a question of claim. If the right was not set up or claimed in the proper court below, the judgment of the highest Court of the State in the action is conclusive, so far as the right of review here is concerned." And see *Brooks* v. *Missouri*, 124 U. S. 394; *Baldwin* v. *Kansas*, 129 U. S. 52.

The result is that the writ of error must be dismissed, and it is so ordered.